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Letter dated 19 December 2001 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General

Upon instructions from my Government and with reference to a letter from the Permanent Representative of Turkey (A/56/451-S/2001/953) dated 9 October 2001, I have the honour to enclose herewith the text of a further opinion, dated 17 November 2001, prepared by three prominent international jurists and professors of international law, James Crawford, Whewell Professor of International Law, University of Cambridge, Gerhard Hafner, Professor of International Law, University of Vienna, and Alain Pellet, Professor of International Law, University of Paris-X, on the eligibility of the Republic of Cyprus to become a member of the European Union (see annex).

Their first opinion, dated 24 September 1997, was circulated as a document of the General Assembly and of the Security Council (A/52/481-S/1997/805), dated 17 October 1997.

I should be grateful if the text of the present letter and its annex would be circulated as a document of the General Assembly, under agenda item 62, and of the Security Council.

(*Signed*) Sotirios **Zackheos**
Ambassador, Permanent Representative

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Annex to the letter dated 19 December 2001 from the Permanent Representative of Cyprus to the United Nations addressed to the Secretary-General

The Eligibility of the Republic of Cyprus for EU Membership

Summary

1. In an Opinion of 24 September 1997 which was circulated as a Security Council and General Assembly document,[1] the three undersigned advised that Cyprus was eligible, as a matter of international law, to become a member of the European Union, and that its becoming a member would not violate any existing treaty obligation of Cyprus.

2. In particular we advised that:

- Article 1 paragraph 2 of the Treaty of Guarantee does not prohibit Cyprus from becoming a member of a regional economic organisation such as the European Union. Membership of the EU would not constitute participation "in any political or economic union with any State whatsoever" within the meaning of Article 1 paragraph 2.
- Article 50 of the Constitution of 1960 (which requires participation by the Vice-President in treaty-making) could not subsequently be invoked by Cyprus as a basis for invalidating its consent to be bound by the EU treaties.
- Likewise, Article 170 of the Constitution (which requires most-favoured-nation treatment for Turkey in respect of certain treaties of Cyprus) does not constitute a barrier to Cyprus' entry, for a number of reasons. Perhaps the most important of these is that EC membership is not regarded as triggering general most-favoured-nation obligations, under the GATT/WTO or otherwise. Turkey as a GATT/WTO member and applicant for EU membership is well aware of this practice. Thus Article 170 would not require Cyprus to extend any additional benefits of EU membership to Turkey.

This advice conforms with what is now the generally accepted position. The European Union itself has acted on the same basis, and accession negotiations have been in progress for some time.

3. By a letter of 5 October 2001, the Permanent Representative of Turkey to the United Nations forwarded a Further Opinion by Professor Maurice Mendelson QC, dated 12 September 2001.[2] The reasons given by Professor Mendelson for adhering to his earlier view that Cyprus's admission to the EU would be "illegal" do not, however, involve any new arguments supporting that conclusion. We set out below the reasons for maintaining — as the EU itself maintains — that there is no legal impediment to the admission of Cyprus.

The Treaty of Guarantee

4. By Article I (2) of the Treaty of Guarantee, Cyprus undertook "not to participate, in whole or in part, in any political or economic union with any State whatever or partition of the Island". By Article II (2), Greece, Turkey and the United Kingdom agreed "to prohibit, so far as concerns them, any activity aimed at promoting, directly or indirectly, either union

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1 J Crawford, A Pellet & G Hafner, "Republic of Cyprus: Eligibility for EU Membership" (A/52/481, S/1997/805, 17 October 1997).

2 Circulated as A/56/451-S/2001/953. An earlier opinion of 6 June 1997, and a supplementary note of 21 July 1997, are annexed.

of Cyprus with any other State or partition of the Island". The question is whether the accession of Cyprus to the EU would involve "union of Cyprus with any other State".

5. In our earlier opinion, we concluded that Articles I (2) and II (2) are irrelevant to Cyprus' EU eligibility, for the following reasons:

(a) On their literal interpretation, these Articles are not concerned with membership in regional economic associations but union with another State ("with any State whatever"). The term "State" was deliberately used in the singular.

(b) The purpose of these Articles was to prevent the union of Cyprus, or of any part of Cyprus, with Greece or Turkey, as well as the partition of the Island. It was not to prevent Cyprus entering international organizations, including regional economic unions such as the European Coal and Steel Community (ECSC), the European Free Trade Area (EFTA) or, now, the EU.

(c) This is confirmed by the *travaux* of the Treaty of Guarantee. As the Turkish delegate at the London Joint Committee assured the other negotiators, by Article I (2)...

> "it was certainly not intended that Cyprus should be precluded from membership of the [European] Free Trade Area or multilateral organizations. What was meant was that Cyprus should not be politically united with Greece or Turkey, or even economically in the narrow sense of customs union; but that could not really be said in a Treaty."[3]

The use of the singular term "any other State" was clearly deliberate. A contrast was intended to be drawn between multilateral arrangements, including economic organizations and free trade areas, on the one hand, and political and/or economic unions with a single State (in fact, Greece or Turkey), on the other hand.

(d) This interpretation is further confirmed by the terms of the Constitution of 1960, which is expressly referred to in the Treaty of Guarantee. Article 185 (2) of the Constitution also uses the singular "any other State" in the prohibition on "integral or partial union". Articles 50 and 169 refer to and permit Cyprus to become a party to international organizations and economic cooperation agreements. There is a clear contrast between multilateral international organizations and economic cooperation with a number of States, on the one hand, and the union of Cyprus with any particular State, on the other hand.

(e) In any event, arguments based on Articles I and II of the Treaty of Guarantee misconceive the character of the European Union. The EU is not a State. Membership of the EU does not entail member States uniting with each other on any individual basis. Under the EU, France is not united with Germany, nor Britain with Sweden. Cyprus as a member of the EU would not be united with any other particular State. Yet it is only Cyprus' union with any other particular State which Articles I and II of the Treaty of Guarantee prohibit. In this context it should be stressed that according to Article 2 TEU, the principle of subsidiarity limits the competences of the EU so that one cannot speak of a "common law-making process" with an all-

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3 London Committee on Cyprus, Corrected Minutes of the 26th Meeting of the Committee of Deputies, LC (MD), 19 October 1959, p 6.

encompassing scope.[4] Furthermore the EU has to respect the national identities of its Member States according to Article 6 (3) TEU.

(f) Our interpretation of Articles I and II is supported by the subsequent practice of the parties to the Treaty of Guarantee. Thus neither the United Kingdom nor Turkey objected on that ground when Cyprus entered into a customs union with the EEC in 1972.[5] Turkey's concerns at possible discrimination against Turkish Cypriots were addressed by Article 5 of the Association Agreement of 19 December 1972.[6] The situation of Cyprus under the Association Agreement and its Protocols was subsequently addressed by the European Court of Justice in 1994, in terms which cast no doubt upon the legality of the situation so far as the EU is concerned.[7]

(g) This interpretation is also supported at the international level. The European Commission has accepted that Cyprus is eligible for membership,[8] and the Member States have so agreed, most recently in the agreement for EU enlargement reached in conjunction with the Treaty of Nice.[9] The Security Council has affirmed that a Cyprus settlement "must exclude union in whole or in part with any other country or any form of partition or secession" and has welcomed "the decision of the European Union concerning the opening of accession negotiations with Cyprus" as "an important development that should facilitate an overall settlement".[10] Obviously the Security Council does not regard the accession negotiations as a breach of an essential condition of a Cyprus settlement.

(h) In addition we noted that Austria joined the EU in 1995, despite the prohibition in Article 4 of the Austrian State Treaty of 1955 against its entering into "political or economic union with Germany in any form whatever". Neither the European Commission nor any existing Member State argued that Article 4 of the Austrian State Treaty prohibited Austrian membership of the EU. Nor did the Soviet Union (or the

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4 Mendelson, Further Opinion, para. 24.

5 *OJEC* No L 133/1 (1973). There have been 6 amendments to the Agreement, most recently in 1987 (*OJEC* No L 393/13 (1987)) and 1995 (*OJEC* No L 278 (1995)). The 1987 Protocol initiated the second stage of association, with a view to a complete customs union within 15 years (Art. 31).

6 The Turkish objections in 1972 are summarized in *Europe* No 986, 16 February 1972. As Professor Mendelson recognises, Turkey did not rely on Article I of the Treaty of Guarantee. He argues that Turkey's failure to object should be overlooked because the 1972 Agreement was "a relatively modest affair": Further Opinion, para. 28. But this cannot be said as to the 1987 Protocol; and anyway, even in 1972, there was a customs union which, on his view, was prohibited by the Treaty of Guarantee.

7 *R v Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd* [1994] ECR I-3087, 3131, 3133-4; 100 ILR 258, 297-9.

8 Commission of the European Communities, *The challenge of enlargement. Commission opinion on the application by the Republic of Cyprus for membership* (*OJEC* Supp 5/93) 7-8.

9 See Protocol on the Enlargement of the European Union; Declaration on the enlargement of the European Union, annexed to the Treaty of Nice, 26 February 2001, *OJEC*, No C 80/1 (2001). See also Helsinki European Council, Presidency Conclusions, Helsinki, 10-11 December 1999, para. 9 (b); Commission of the European Communities, 2001 Regular Report on Cyprus Progress towards Accession, Doc SEC (2001) 1745.

10 See Security Council Res. 1117 (1997), 27 June 1997. For later resolutions on Cyprus, see e.g. SC Resns. 1354 (2001), 15 June 2001, 1331 (2000), 13 December 2000, 1251 (1999), 29 June 1999.

Russian Federation, after the break-up of the USSR); its concern was with the neutrality of Austria.

6. Thus the literal terms of Articles I and II of the Treaty of Guarantee, interpreted in the light of their object and purpose, support our conclusion. So too does the negotiating history of the Treaty, the subsequent practice of the parties, and the unanimous opinion of the EU Members as well as the European Commission. Among States which are not members of the EU, only Turkey seems to take the opposite position. Certainly the Security Council does not, despite its continuing preoccupation with the situation in Cyprus and with the preconditions for a settlement of the Cyprus question which "must exclude union in whole or in part with any other country or any form of partition or secession".[11]

7. In opposition to this virtually unanimous view of Cyprus' eligibility for membership, notwithstanding the Treaty of Guarantee, Professor Mendelson makes a number of arguments in his most recent opinion. These include the following:

(a) Applying the principle of literal interpretation, he argues that because the EU is "an economic union, as well as (increasingly) a form of political union", therefore membership of the EU is prohibited.[12] But literal interpretation requires one to interpret all the words, not just some of them, and to interpret all the words together in their context. The question is not whether the EU is an economic union, but whether a State which joins the EU is entering into an economic union "with another State" within the meaning of the Treaty of Guarantee.

(b) He argues that "in legal drafting in English" (and in French) the singular includes the plural, so that Article I should be read as prohibiting economic union "with any State or States".[13] But not even under the Acts Interpretation Act 1889 (UK) is there a *rule* that the singular includes the plural; it depends on the context. And of course we are dealing with a treaty, albeit one drafted in the English language. There was a reason for the emphasis on the singular: the concern was political or economic union of Cyprus with a single State (i.e., Greece) or of part of Cyprus with another State (Turkey). It was not a concern with such things as the European Free Trade Agreement.

(c) He argues that the veto provisions in Article 50 of the Constitution show that "international organizations *are* covered by the [Treaty of Guarantee] and, if both the two named States are not members of the organization, by the veto".[14] This confuses the veto powers exercisable by an elected Turkish Cypriot Vice-President and the rights of the three guarantor States under Article I of the Treaty of Guarantee. If a treaty involves political or economic union with another State, Cyprus may not enter into that treaty, even with the consent of the Vice-President. Moreover whether Turkey and/or Greece are parties to such a treaty is irrelevant in terms of the application of Articles I and II of the Treaty of Guarantee. Cyprus may not enter into such a treaty, whatever the position of the other States may be.

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11 Security Council Res. 1251, 29 June 1999, para. 11.

12 Mendelson, Further Opinion, para. 10.

13 Mendelson, Further Opinion, para. 13.

14 Mendelson, Further Opinion, para. 17 (emphasis in original).

(d) He then argues that the EU is an economic and political union of States, even if it is not itself a State, and that in entering into the EU Cyprus is entering into a union with each of those other States in just the same way it would do if it entered into a federation.[15] That argument assumes, of course, that we are wrong in emphasising that Article I is limited to union with another particular State rather than a large group. But even on that assumption, it is not the case that Greece or the United Kingdom would exercise authority in Cyprus as part of the EU. The decisions and literature on the Maastricht Treaty, cited in our earlier opinion, demonstrate that this is not the case.[16] All sorts of international organizations involve coordination of activity, the "joint" pursuit of "common" policies in the political and economic field.[17] The EU is no doubt a very advanced example, but it is not, directly or indirectly, a vehicle for the exercise by one member State or its officials of public authority over another. The organs of the EU are not organs of any Member State or States. The context of the Treaty of Guarantee and related instruments show that, although there were to be controls on Cyprus becoming a member of international organizations including free trade areas, Article I was intended to address the separate and much narrower issue of a union with another State.

(e) Then he argues that, even if EU entry would not involve political or economic union with other States, it would "indirectly promote union with another State or States".[18] Of course the phrase "or States" does not appear in Articles I and II of the Treaty of Guarantee. But in any event we fail to see what *indirect* aim EU membership might have for Cyprus, i.e. how it would tend to produce union with any other State or States, or what *indirect* tendency it might foster which the Treaty of Guarantee seeks to prohibit. No doubt in 1959-60, Turkey sought to vest in an organ elected by the Turkish Cypriot community veto powers over joining organizations of which Turkey is not a member. But — we repeat — this separate Turkish aim was achieved by Article 50 of the Constitution, and not by the Treaty of Guarantee's prohibition on political union. We discuss this further in paragraphs 8-10 below.

8. There is also provided a note by Professor Mendelson dated 21 July 1997 in which he dismisses the Austrian case as only superficially similar. His main argument is that the other parties to the Austrian State Treaty of 1955 waived the provisions of Article 4 at the time. In other words, his view is that Austrian membership of the EU would have been a breach of the Article 4 of the Austrian State Treaty but for the consent of all the other parties to it.[19] He does not cite any statement to that effect by any of the other States parties, nor any of the extensive literature on the subject in English or German.[20] There is simply no evidence that the Soviet Union (or later the Russian Federation) considered that it was waiving rights under Article 4 of the State Treaty, or that its individual consent to Austrian accession was required.

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15 Mendelson, Further Opinion, para. 24.

16 J Crawford, A Pellet & G Hafner, "Republic of Cyprus: Eligibility for EU Membership", paras. 13-15.

17 Cf. Mendelson, Further Opinion, para. 24.

18 Mendelson, Further Opinion, para. 25.

19 M. Mendelson, "Note on Austria's Accession to the European Union", para. 1 and concluding para.

20 We referred to this material in 24-27 of our Opinion of 24 September 1997.

There is no suggestion that the consent of the other States parties to the Treaty of 1955 was sought or required to what would otherwise have been a breach of Article 4. Russian objections as articulated at the time concerned not Article 4 but the issue of neutrality. Similarly, Russian literature at the time of the accession stressed Austria's neutrality as a potential problem, but not Article 4.[21] The European Commission did not believe that Article 4 presented any difficulty, either.[22] In short, Professor Mendelson cites no evidence in support of his "waiver" theory, and we are aware of none.[23]

Article 50 of the 1960 Constitution

9. A second issue concerns Article 50 of the Constitution of 1960, which provides for the President and Vice-President to have, separately and conjointly, a right of veto in decisions concerning, *inter alia*, "foreign affairs, except the participation of the Republic in international organisations and pacts of alliance in which the Kingdom of Greece and the Republic of Turkey both participate". Unlike Articles I and II of the Treaty of Guarantee, which are expressed as absolute prohibitions, Article 50 distinguishes between international organizations and pacts of alliance in which Greece and Turkey are, and those in which they are not, parties. It thus addresses what we understand to be Turkey's essential concern, which is that it does not wish Cyprus to become a party to the EU before it does. In other words, its real concern is one of timing, not the application of an absolute prohibition.

10. The difficulty, however, with Article 50 is that it is presently inoperative since no person holds or exercises the office of Vice-President, for reasons that are well known.[24] The question is whether this fact prevents Cyprus from applying to or becoming a member of the EU, and the answer is clearly no. As Article 50 of the Constitution recognises, Cyprus has the normal capacity of a State to enter into "international treaties, conventions and agreements" and to become a member of all kinds of international organizations and alliances. It provides for a procedural veto on such decisions, the veto to be cast within a prescribed period by a Vice-President elected under the Constitution. In the absence of a veto

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21 See, e.g., K.V. Voronov, "Chertvertoe rasshirenie ES: tormoz ili stimul integracii?" (The fourth widening of the EC: brake or stimulation of the integration?) in: *MeiMO* no. 8-96, Moscow 1996, 88).

22 See EC, Sec/91/1590 Final, 1 August 1991, summarised in *Bull EC* 7/8-1991, 81, as cited in our Opinion of 24 September 1997, para. 25.

23 Professor Mendelson's other arguments can be dealt with more briefly. He seeks to distinguish Article 4 of the Austrian State Treaty from the Treaty of Guarantee because the former specifically mentions Germany whereas the latter refers in general terms to "any other State". But the failure to mention Greece and Turkey specifically does not affect the matter. As everyone knows and as the *travaux préparatoires* show (see paragraph 4 (c) above), the problem in 1959-60 was union with one of those States, especially Greece. Then he argues that there has at least arguably been a fundamental change of circumstances between 1955 and 1991. But no party to the Austrian State Treaty has purported to rely on fundamental change of circumstances as a ground for the termination of the treaty, and as Article 62 of the Vienna Convention on the Law of Treaties makes clear, treaties do not automatically lapse on grounds of fundamental change; the change has to be invoked by a party. Finally he argues that "two wrongs do not make a right"; of course we agree, but that has nothing to do with the issue whether Austrian accession was a breach of Article 4, and the fact is that none of the concerned parties at the time so considered it.

24 They are briefly set out in our Opinion of 24 September 1997, para. 29.

duly cast in accordance with Article 50, the decision to accede is valid and effective. Nor could Cyprus, if it did accede to the EU, subsequently rely on Article 46 of the Vienna Convention on the Law of Treaties as a ground for disputing the validity of its accession.[25] The simple reason is that, in the absence of a veto cast by a person holding the office of Vice President in accordance with the Constitution, there is no breach, and certainly no manifest breach within the meaning of Article 46.

11. On this point, Professor Mendelson emphasises the international aspect of the Cyprus Constitution, the element of international guarantee involved, and the overlap between the Constitution, especially Article 50, and the Treaty of Guarantee.[26] With some of this we agree, but it is hardly relevant to the present point. There is a clear distinction between the existence of an international guarantee and the scope or application of particular provisions of a constitution which is subject to the guarantee. We have already pointed out the distinction between Article 50 of the Constitution (which is an important procedural provision concerned with treaty-making, even if it is for the time being inoperative) and Article I of the Treaty of Guarantee which is a prohibition on the making of a certain limited class of treaties at all, by any authority in Cyprus whatever. Professor Mendelson elides the distinction entirely.[27]

Article 170 of the 1960 Constitution

12. A third issue concerns Article 170 (1) of the 1960 Constitution, which entitles Greece, Turkey and the United Kingdom to seek most favoured nation (mfn) treatment from Cyprus, "by agreement on appropriate terms" in respect of "all agreements whatever their nature may be." It has been argued that Cyprus as an EU Member will not be in a position to comply with Article 170 so far as Turkey is concerned. The short answer to this is that there is a general understanding that entry to the EU does not trigger general mfn obligations of the entrant so far as third States are concerned. This is consistent with Article XXIV (5) of the GATT.[28] It is a position which Turkey itself has accepted, both as a GATT Member, as an applicant for EU membership, and in bilateral arrangements with Cyprus.[29]

13. In any event, Article 170 only operates by agreement, which agreement has to be "on appropriate terms". Even if it were applicable in principle to EU membership (which it is

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25 Under Art. 46 only the State whose fundamental rules as to treaty-making have been manifestly breached can invoke the breach.

26 Mendelson, Further Opinion, paras. 37-38.

27 Professor Mendelson also raises the question whether the breakdown of Article 50 may be "wholly or mainly the fault of the Greek Cypriot majority": Mendelson, Further Opinion, para. 37. For our part, we have sought to avoid controversy on historical issues of the 1960s. Most observers would say that there was fault on all sides, including both communities within Cyprus. In any event, whatever the responsibility of the various actors (including the three Guarantors) for the constitutional and international crisis of that period, the issue is the conduct of the foreign policy of Cyprus at the present time, and the international law on this point is as we have stated it.

28 See also the Understanding on the Interpretation of Article XXIV of the GATT 1994, in WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations. The Legal Texts* (Geneva, 1994) 31.

29 Cyprus-Turkey, Trade Agreement, 9 November 1963, Art. 1. See also the identically phrased Trade Agreement between Greece and Cyprus, 24 August 1962.

not), all Article 170 would do would be to call on the parties to reach agreement in particular "on appropriate terms" for granting mfn treatment.

14. Professor Mendelson regards this issue as "subsidiary",[30] and we agree. He does not argue that "the entry of Cyprus into the EU without Turkey would violate some existing right of Turkey to MFN treatment";[31] again we agree. He does however argue that Greece and Greek citizens will be advantaged in Cyprus compared to Turkey and Turkish citizens, and to some extent this is true. Our point was that, purely as a question of law and of the application of Article 170, entry into a regional economic union does not trigger mfn obligations, and that Turkey itself accepts this.[32] The economic disadvantages for Turkey of its non-membership of the EU remain matters to be addressed at the level of policy by the EU, as well as by Turkey.[33] No doubt they will be, since the long-term interests of the region can only be addressed by a policy of inclusion.

Conclusions

15. For the reasons we have given, we remain firmly of the opinion that there is no legal basis for the argument that Cyprus is prevented by the Treaty of Guarantee, or by any provisions of the Constitution of 1960, from becoming a member of the EU or from complying with its treaty obligations towards Turkey once it becomes a member.

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Alain Pellet
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17 November 2001

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30 Mendelson, Further Opinion, para. 39.

31 Ibid.

32 So, apparently, does Professor Mendelson; at least he does not argue the contrary.

33 Professor Mendelson also points to the difficulties of applying EU law uniformly within Cyprus: Further Opinion, para. 42. We understand this issue is being addressed in the accession negotiations. Again, however, it is not a legal barrier to eligibility.